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No. 88-978 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

D.C. TRANSIT SYSTEM, INC.,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, BLACK UNITED FRONT, *et al.*,

Respondents.

BRIEF OF RESPONDENTS, BLACK UNITED FRONT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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D.C. TRANSIT SYSTEM, INC.,

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Brief Of Respondents, Black United Front In Opposition To Petition For Writ of Certiorari

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RESTATEMENT OF THE CASE

D.C. Transit System, Inc. (hereinafter "Transit"), as was its predecessor Capital Transit Company (hereinafter "Capital") was not so much a public utility as it was a real estate venture. *Democratic Central Committee* v. *Washington Metropolitan Area Transit Commission* (DCCI), 458 F.2d 786, 811-812, 814-817 (1973), *cert. denied*, 415 U.S. 935, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974); *Democratic Central Committee* v. *Washington Metropolitan Area Transit Commission*

(DCCII), 458 F.2d 886, 899 (1973), *cert. denied*, 415 U.S. 935 S.Ct. 1451, 39 L.Ed.2d 493 (1974).

The grant by Congress of a franchise to Transit was conditioned on the acquisition of Capital's assets and the conversion of a streetcar/bus system to an all bus system.

This requirement caused Transit to assume an undepreciated cost of tracks and streetcars of $5 Million and a cost of removal of streetcar tracks and repairing and regrading of streets of $10 Million. *The cost of both of these items was later paid by the farepayers. DCCI*, 458 F.2d at 813-814, 816, 842.

At the same time, predictably, millions of dollars worth of real estate automatically lost its usefulness to Transit and was transferred out of operating status ("below the line") at book value. *Id.* at 789, 842, *DCCII*, 458 F.2d at 897, 899.

Transit and its stockholders received the benefit of the "useless" real estate to the extent of the excess of market value over book value and knew it would receive such benefit when Transit and its assets were condemned.

The Washington Metropolitian Area Transit Commission (hereinafter "Commission") based its fare-setting primarily on gross operating revenues (the operating value method) commencing in 1960. *DCCI*, 458 F.2d at 815.

Although the Commission did also consider the undepreciated costs of tracks and streetcars and the cost of track removal in fixing fares *Id.* at 816, it did not consider the "income" from market value of the "useless" real estate. *Id.* at 790. The Court of Appeals held this ommission to be error.

ARGUMENT

(Reasons for Denying the Writ)

At the outset, it is clear that no substantial constitutional questions are presented and that the Petition for Certiorari involves only matters of local law interpretation with which the Supreme Court is not concerned. *Id.* at 800-822.

The absence of any constitutional issue is amply demonstrated by Judge McKinnon's dissenting views upon which petitioner relies so heavily. Judge McKinnon takes issue with the Majority and believes they are in error to uphold the Commission's Order and to grant equitable relief. In concert with what appears below, Judge McKinnon heavily relies on his equitable disagreements with the majority, all of which emphasize the absence of a constitutional issue.

> "The Court of Appeals' holding was based upon the particular and unique facts (cite omitted) of this case (cite omitted) and is not a general holding relating to other kinds of assets or to other utilites.
>
> Central to this case was the fact that Congress and Transit "knew . . . that a good part of these same properties would . . . no longer be needed for transportation purposes" (cite omitted) when the stockholders acquired the stock of Transit.
>
> And the Court of Appeals specifically did not deal with the "kind of situation. . . that would have existed had the properties been purchased outright by [the] investors." (cite omitted)
>
> What the Court of Appeals held was that in this particular and unique fact situation "that in pass-

> ing on Transit's application for higher fares, the Commission should have considered the appreciation in the value of certain of Transit's landholdings occurring while the lands were in service and prior to this transfer from operating to non-operating status." (cite omitted)

These are the first four paragraphs of Black United Front's ("BUF") argument to Transit's 1973 petition for certiorari to *DCCI*, 485 F.2d 786 (1973), *cert. denied* 415 U.S. 935 (1974). Transit also took petition for certiorari to *DCCII*, 485 F 2d 886 (1973), *cert. denied* 415 U.S. 935 (1974).

The issues raised in the petition for certiorari to both *DCCI* and *DCCII* are identical to the issues raised in the petition for certiorari to *DCCIII*.

These arguments are essentially that the Court has engaged in retroactive ratemaking and the property of Transit and its stockholders has been confiscated without due process.

First, certiorari was denied in 1974 at 415 U.S. 935 to all of the same issues as are raised in the current petition for certiorari to *DCCIII*.

Second, Judge Robinson in *DCCII*, 485 F.2d at 912-3, stated:

> "The Commission has made a most conscientious effort to set Transit's fares at the proper level, and its task has been a most difficult and complex one. But we cannot avoid concluding that, performing its burdensome function, the agency has throughout acted on the erroneous postulate that it was compelled-no matter to what level it must raise the fares, how substantial the fall in rider-

ship, and how financially sick Transit might be- to set the fares so that Transit could always earn a profit. To be sure, Transit was entitled to a reasonable opportunity to earn a fair return from its operations.(cite omitted) It was not, however, for the Commission to insure a return. Neither the Compact (cite omitted) nor the Franchise Act (cite omitted) authorized a guarantee, nor did due process require it (cite omitted) nor, as the cases make plain, was it the Commission's prerogative to afford it. (cite omitted) Though the Commission has also commented that it has considered the public interest in restraining the rise in fares, we are convinced that the incorrect postulate to which we have referred has initially infected the Commission's whole thinking and its ratemaking process. Order No. 1052, in particular, cannot be judged apart from that mistaken premise, which we judge to be at its core. For this reason, as well as for the others we discuss in this opinion, (cite omitted) that order cannot stand.

. . .

"Given these infirmities in Order No. 1052, we are faced with the question of the disposition mandated. Defective fare orders cannot be cured by retroactive ratemaking, (cite omitted) nor is the Commission in a position to promulgate any new fares for Transit in light of the recent public takeover of its transportation assets and operations. (cite omitted) Nevertheless, we cannot give legal effect to the invalid fares set in Order No. 1052 by allowing that order to stand. (cite omitted) As in *Democratic Central Committee*, decided today, as in its decisional forerunner, *Williams*

> *v. Washington Metropolitan Area Transit Commission*, (cite omitted) we find the appropriate avenue of relief here to be restitution." 485 F.2d 913.

The proceedings before the Commission, the Court of Appeals and the Supreme Court have always been the same. They are not ratemaking proceedings. As appears from the quotation above, the proceedings are equitable for a clear reason. By the time the Court of Appeals had decided *DCCI* and *DCCII*, Transit had been condemned.

The only issue placed before the Court by Transit, as affects its petition for certiorari, is to what extent the increase in value of real estate, both depreciable and non-depreciable, should have been taken into account in rate fixing and the extent to which bus riders should have received the benefit therefrom.

DCCIII reaffirmed both *DCCI* and *DCCII* and the conclusions that the Commission made at the direction of the Court of Appeals.

There are not any new issues of law in *DCCIII* that were not decided in both *DCCI* and *DCCII* - and these very same issues were raised in the 1973 certiorari petition and were denied by the U.S. Supreme Court. 415 U.S. 935 (1974).

The Court of Appeals held in 1973 in this particular and unique fact situation "that in passing on Transit's application for higher fares, the Commission should have considered the appreciation in the value of Transit's real estate holdings while the real estate was in service and prior to its transfer from operating to non-operating status." *DCCII*, 485 F.2d at 895.

The Court of Appeals decision, then (i.e. *DCCI* and *DCCII*) and now (*DCCIII*), was based on a set of facts entirely unique to Transit. The Court of Appeals decided that when acting upon Transit's several fare applications, the Commission should have considered the income generated by real estate appreciation which everyone knew was to be removed from use for streetcar service at the time the stockholders acquired Transit. These cases do not present Fifth Amendment questions since they do not involve all acquisitions of property by utilities, or even all utilities, but only the unique case of one unique acquisition of real property in the District of Columbia under unique circumstances and particular legislation.

And, more specifically as to the questions of retroactive ratemaking and depreciation of property in violation of the Fifth Amendment, the Court of Appeals in *DCCII*, 485 F.2d 886, *cert. denied*, 415 U.S. 935 (1974) has made the critical issue extremely clear. *This is not a ratemaking case.* D.C. Transit was out of business by 1973 and the questions decided by the Court of Appeals were equitable in nature.

Rule 17 of this Court requires, in addition to a Constitutional issue, (See above) either a disagreement between this circuit and another circuit deciding the same issue, or a conflicting opinion within the D.C. Circuit.

Neither of these situations exists.

CONCLUSION

For the reasons stated above, we respectfully pray that the Court deny the petition for Writ of Certiorari.

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